

Stephen K. Yamashiro  
Mayor



Virginia Goldstein  
Director

Russell Kokubun  
Deputy Director

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## County of Hawaii

### PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252  
(808) 961-8288 • Fax (808) 961-8742

November 4, 1997

DOCKET FILE COPY ORIGINAL

Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Ladies and Gentlemen:

Notice of Proposed Rule Making Before the Federal Communications Commission  
Regarding the Preemption of State and Local Zoning and Land Use Restrictions  
on the Siting, Placement and Construction of Broadcast Station (Digital Television)  
Transmission Facilities (MM Docket No. 97-182)

Our office has been made aware of the above-described public notice of proposed rule making regarding the preemption of certain state and local land use ordinances regarding the implementation of digital television service. We have carefully reviewed the proposed rule and have the following comments to offer.

1. The proposed rule seeks to preempt state and local zoning and other land use regulations which may "unreasonably prohibit or delay the DTV roll-out and other ongoing broadcast transmission facilities construction." The County of Hawaii Zoning Code (Chapter 25, Hawaii County Code) and the State Land Use Law (Chapter 205, Hawaii Revised Statutes) contains specific provisions and procedures to allow the construction of communication equipment and facilities on lands throughout the county. Similarly, the County's Building Code also contains specific requirements for the construction of such facilities and equipment. All of these code requirements, rules and regulations are in place to ensure the general public's welfare and safety. The preemption of these code requirements, rules and regulations to facilitate the implementation of DTV may sacrifice the welfare and safety of the general public solely for technological advancement; a sacrifice that we are unwilling to accept.

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Office of the Secretary  
Federal Communications Commission  
Page 2  
November 4, 1997

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2. The State's Coastal Zone Management law (Chapter 205A, Hawaii Revised Statutes) and related rules and regulations of the counties manages land use and activities within designated coastal areas to ensure the protection and proper management of coastal resources. Since the State and counties' Coastal Zone Management laws and regulations were promulgated under authority granted by the Federal Coastal Zone Management Act (CZMA) of 1972, as amended, are we correct to assume that the proposed rule will not preempt the requirements of the state's or counties' Coastal Zone Management laws and regulations?

Thank you for allowing our office to comment on the proposed rule. Please contact staff planner Daryn Arai of this office should you have any questions.

Sincerely,

  
VIRGINIA GOLDSTEIN  
Planning Director

DSA:jkg  
f:\wp60\dsa\1997\LFCCr101.dsa

xc w/notice: West Hawaii Office  
Office of Planning-DBEDT  
DPW-Building Division



*Los Angeles County*  
*Department of Regional Planning*  
*Director of Planning James E. Hartl, AICP*



**RECEIVED**

October 28, 1997

NOV 13 1997

**FCC MAIL ROOM DOCKET FILE COPY ORIGINAL**

Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Dear Commissioners:

**SUBJECT: COMMENTS ON DOCKET NO. 97-182 REGARDING THE FEDERAL  
PREEMPTION OF LOCAL CONTROL ON THE PLACEMENT OF DIGITAL  
TELEVISION TOWERS**

The County of Los Angeles Department of Regional Planning appreciates the opportunity to comment on your MM Docket No. 97-182, entitled the "Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Station Transmission Facilities".

In essence, this Department is concerned that the proposed rule concerning digital television towers would preempt local zoning and land use control. The Board of Supervisors of Los Angeles County, in fact, has a standing policy that directs its agencies and departments to express concern and to comment on all proposals concerning preemption of local control.

While your documentation clearly discusses the dilemma posed by previous directives given to the television industry, we believe that the problems of local control are overstated by the industry's submittal. They present a scenario that gives the impression that all local jurisdictions will endeavor to delay or deny the construction and placement of these towers. In this jurisdiction, that has not been the experience.

In Part IV, Section 23, of the Commission's proposal, titled "Request for Comments", your agency asks specific questions regarding the preemption of local control. Following are our comments on each question:

1. Are the time frames proposed by Petitioners reasonable?

The petitioners propose that local jurisdictions have a maximum of 45, and in some cases, 21 days to act on requests for the placement, construction, or modification of broadcast transmission facilities. We believe that this time period is unreasonable. It does not allow sufficient time for public notice and hearing, much less public testimony.

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Page Two

The County of Los Angeles administers the land use regulations atop Mt. Wilson, the primary site for communication facilities in Southern California. Our records indicate that all requests for facilities atop Mt. Wilson have been approved. The time period for processing these requests has varied; but appears to have averaged approximately 4 months or 120 days.

However, since the approval of the last tower request on Mt. Wilson, this jurisdiction initiated modified procedures to streamline the process. One of these allows an applicant to contract directly with this Department to speed up the projects even further. As a pertinent example, some of the communication companies constructing cellular telephone tower sites have utilized this process to achieve accelerated processing of their requests. As a result their approvals have averaged 75 days.

2. Should we preempt state and local government authority where they fail to act within certain time periods? If so, what should be those time periods? Is 45 days appropriate, or would 90 days be more realistic for broadcast tower applications?

This jurisdiction, as stated, is concerned whenever there is a proposal to preempt local authority. While the state or federal government may argue that there are necessities that dictate severe actions of this type; we believe that local officials, with input from their constituents, are best suited to make decisions that may directly affect their jurisdiction. For example, our interactions with the applicants on cellular telephone requests has led to compromises and innovative designs that have allowed many of their towers to be placed in close proximity to residential neighborhoods without objection.

As stated above, we do not believe that the proposed time frames are realistic. The State of California has a permit streamlining act that basically compels action on a land use request within 180 days for an environmental decision requiring a negative declaration and one year for those requiring an environmental impact report. This jurisdiction has abided by that standard and believes it to be sufficient.

3. Can the DTV construction schedule in the Fifth report and Order be reconciled with the procedures of states and localities?

At the end of your comment period, it will be November 1, 1997. Our reading of your order leads us to believe that Los Angeles County is one of the top ten markets, and, therefore, the four networks are required to be on the air with a digital signal within the next 18 months.

We believe that this jurisdiction, using its current codes and regulations, could process and act on those requests within that time period.

The Commission should be aware, however, that to our knowledge no representatives of the networks have approached this jurisdiction with a request for placement, construction, or modification. If they do not require new towers or severe modifications to their existing sites, then perhaps this discussion is moot in regard to Los Angeles County; but, if they need government concurrence in their plans, they should be directed to make immediate application regardless of your Commission's decision on preemption. Clearly, local governments can't be blamed if the networks delay until the last moment.

4. In the event that we preempt as to procedural aspects of zoning and land use regulation, what constraints, if any, are there on the ability of state and local governments to meet the expedited procedures sought by Petitioners?

For purposes of discussion, we presume that the question poses a preemption narrowly focused on the requirements of local zoning and building codes. That being the case, the Commission should be aware that there are indeed other restraints inherent to the process.

In the State of California there exists a considerable body of environmental laws and regulations. The California Environmental Quality Act and commonly referred to as CEQA, these laws shape all development within the State. Any "project" ( a term defined within CEQA) must go through a process of environmental review. This review could establish that the project is "categorically exempt" or determine that it requires the preparation of an Environmental Impact Report (EIR). In any event CEQA establishes its own time periods for making these determinations. In this jurisdiction, we have recognized the impact of these time periods on the process and devised means of accommodating them within the normal hearing process. In the event of an EIR being required, however, there would be a considerable expenditure of time.

It has also been our experience that in the public hearing process there are also time constraints created by the needs of agencies and companies that are beyond local government's control. The newspaper industry has its own deadlines for the submittal and advertising of legal notices. We must comply with those requirements to achieve proper legal notice. The same is true of the United States Postal Service. We must presume a certain minimal delivery time to once again ensure that legal notice requirements are met. Finally, we must provide a process for appeal and, again, that process must meet legal advertising requirements.

None the less, these restraints have been in place for a considerable number of years and we have still managed to process these requests in what we believe is an acceptable time period.

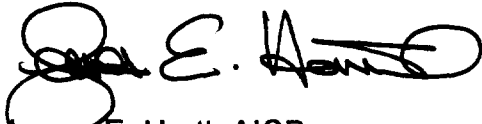
Page Four

5. Finally, the Commission asks us what we think the role of the FCC should be.

The above paragraphs clearly indicate that this jurisdiction believes that local government best knows and understands what is desirable for its citizens. As stated, this has not worked to the detriment of the television industry in the past and we do not believe it will in the future. We accept the compromise achieved as part of recently adopted Telecommunications Act; that local government will retain placement and construction control and the federal government preempts in the matters of the environmental and health concerns related to radio frequency emissions, interference with other signals, and tower marking and lighting requirements. In the area of cellular telephone communications, this concept has benefitted both branches of government and the public as well. In addition, it is our understanding that was a compromise specifically arrived over controversy regarding this issue of local control.

We hope that this letter aids your commission in its decision making process. Should you have questions, please call John Schwarze of my staff at 213-974-6441. Our offices are open Monday through Thursday from 7:00 a.m. to 6:00 p.m. PDT. The offices are closed on Fridays. We, of course, would appreciate receiving updates on the proposed ruling, especially the final decision.

DEPARTMENT OF REGIONAL PLANNING

A handwritten signature in black ink, appearing to read "James E. Hartl".

James E. Hartl, AICP  
Director of Planning

JEH:js

c: Supervisor Gloria Molina  
Supervisor Yvonne Brathwaite Burke  
Supervisor Zev Yaroslavsky  
Supervisor Don Knabe  
Supervisor Michael D. Antonovich  
Chief Administrative Office  
National Association of Counties

# **MID-AMERICAN AIR CENTER**

*The LAWRENCEVILLE-VINCENNES INTERNATIONAL AIRPORT*

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NOV 13 1997

FCC WASHINGTON

October 30, 1997

Office of the Secretary  
Federal Communication Commission  
1919 M Street N.W.  
Washington DC 20544

DOCKET FILE COPY ORIGINAL

Dear Mr. Secretary

RE: Comments on Notice of Proposed Rule Making; MM Docket No.97-182

We hope that you will reconsider the position of the FCC assuming preemptive powers over the States and units of Local government with regard to regulation of communication tower location and height.

We feel this action taken by the FCC could cause serious aviation safety problems in that the FAA will not place limits on tower height or placement; therefore, it is up to Local and State airport authorities to regulate these structures. Public safety should be the priority for all government agencies, and I urge you to explore other options.

Sincerely



John Bobe  
Chairman of the Board

JB/cc

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October 28, 1997

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Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

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PREEMPTION OF LOCAL CONTROL ON THE PLACEMENT OF DIGITAL  
TELEVISION TOWERS**

The County of Los Angeles Department of Regional Planning appreciates the opportunity to comment on your MM Docket No. 97-182, entitled the "Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Station Transmission Facilities".

In essence, this Department is concerned that the proposed rule concerning digital television towers would preempt local zoning and land use control. The Board of Supervisors of Los Angeles County, in fact, has a standing policy that directs its agencies and departments to express concern and to comment on all proposals concerning this issue.

While your documentation clearly discusses the dilemma posed by previous directives given to the television industry, we believe that the problems of local control are overstated by the industry's submittal. They present a scenario that gives the impression that all local jurisdictions will endeavor to delay or deny the construction and placement of these towers. In this jurisdiction, that has not been the experience.

In Part IV, Section 23, of the Commission's proposal, titled "Request for Comments", your agency asks specific questions regarding the preemption of local control. Following are our comments on each question:

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Page Two

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However, since the approval of the last tower request on Mt. Wilson, this jurisdiction initiated modified procedures to streamline the process. One of these allows an applicant to contract directly with this Department to speed up the projects even further. As a pertinent example, some of the communication companies constructing cellular telephone tower sites have utilized this process to achieve accelerated processing of their requests. As a result their approvals have averaged 75 days.

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We believe that this jurisdiction, using its current codes and regulations, could process and act on those requests within that time period. We also believe that there is a high probability that the

Page Three

requests would be approved.

The Commission should be aware, however, that to our knowledge no representatives of the networks have approached this jurisdiction with a request for placement, construction, or modification. If they do not require new towers or severe modifications to their existing sites, then perhaps this discussion is moot in regard to Los Angeles County; but, if they need government concurrence in their plans, they should be directed to make immediate application regardless of your Commission's decision on preemption. Clearly, local governments can't be blamed if the networks delay until the last moment.

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knows and understands what is desirable for its citizens. As stated, this has not worked to the detriment of the television industry in the past and we do not believe it will in the future. We accept the compromise achieved as part of recently adopted Telecommunications Act; that local government will retain placement and construction control and the federal government preempts in the matters of the environmental and health concerns related to radio frequency emissions, interference with other signals, and tower marking and lighting requirements. In the area of cellular telephone communications, this concept has benefitted both branches of government and the public as well. In addition, it is our understanding that was a compromise specifically arrived over controversy regarding this issue of local control.

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#### DEPARTMENT OF REGIONAL PLANNING

James E. Hartl, AICP  
Director of Planning

c: Supervisor Gloria Molina  
Supervisor Yvonne Brathwaite Burke  
Supervisor Zev Yaroslavsky  
Supervisor Don Knabe  
Supervisor Michael D. Antonovich  
Chief Administrative Office



# BOARD OF SUPERVISORS COUNTY OF LOS ANGELES

821 KENNETH HAHN HALL OF ADMINISTRATION  
500 WEST TEMPLE STREET / LOS ANGELES, CALIFORNIA 90012  
(213) 974-3333 / FAX (213) 625-7360 / INTERNET ID: zev@co.la.ca.us

**RECEIVED****NOV 13 1997****FCC ROOM****ZEV YAROSLAVSKY**

CHAIRMAN OF THE BOARD  
SUPERVISOR, THIRD DISTRICT

**Fax Transmittal****DOCKET FILE COPY ORIGINAL****PLEASE DELIVER TO:**

**Name:** James E. Hartl  
**Agency:** Regional Planning Department  
**Fax Number:** (213) 974-6384  
**Date:** October 20, 1997

*Jim Friedman*  
*x 41348*

**FROM:**

**Name:** Ginny Kruger  
**Fax Number:** (213) 625-7360  
**Subject:** FCC/TV/Radio Broad Cast Tower  
**Number of Pages (including cover sheet):** 3

**NOTE:** Jim - Here's communication from NACO I spoke to you about.  
Thanks.

If the transmittal you receive is incomplete or illegible, please call 213/974-3333.

(c:\fax.01)

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**NACO** National Association of Counties

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**LEGISLATIVE ALERT**

Staff Contact: Bob Fogel-(202)942-4217

October 9, 1997

**TO:** Large Urban County Caucus  
State Association Executives  
Transportation and Telecommunications Steering Committee  
Washington County Representatives  
Telecommunications Group

**FROM:** Larry E. Naake  
Executive Director

**RE:** Federal Communications Commission (FCC) Preemption of Local Zoning

---

The FCC has issued a rule making (Docket No. 97-182) which would preempt local zoning authority over television and radio broadcast towers. This is being done in connection with the roll out of the new digital television technology which, in some cases, will require towers which are nearly one-half mile high. Counties are urged to submit comments by October 30 to the FCC on this rule making. A full text of this rule making is on the FCC site on the Internet ([www.fcc.gov](http://www.fcc.gov)) or can be obtained from NACo.

The impetus for this proposed rule, which originated with the National Association of Broadcasters, is to aid in the implementation of digital television (DTV) service. More than half of all households are scheduled to have access to DTV by the end of 1999 and the industry claims that an estimated 1000 towers will need to be replaced or upgraded. The industry has requested the FCC, which claims it has the authority, to broadly preempt local zoning and land use authority that would delay or prohibit tower construction.

County governments need to be concerned with this rule because it would severely preempt local zoning authority over the siting and construction of towers. The FCC proposes unrealistic time limits for local action on tower construction requests, preempts local concerns including aesthetics and environmental issues, and sets up the FCC, as opposed to the courts, as the authority for appeals.

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OCT 13 1997  
OFFICE OF CLERK

rights of the rule making are as follows:

requires local governments to act on all zoning and building permit requests for at least tower construction within 21 to 45 days, ignoring current local procedures for zoning requests. Failure to do so within these time limits would cause the request to be automatically granted.

Even acting within these time constraints, the proposed FCC rule would preempt all local zoning and building permit requirements unless a local government could demonstrate the requirement was reasonable in order to meet health or safety objectives. Other requirements such as aesthetics, property values, and environmental considerations would be preempted entirely.

- Any broadcaster unhappy with a local decision could appeal directly to the FCC, rather than going through the court system which is the current practice. County governments would be required to defend themselves at the FCC in Washington rather than in local State or Federal courts.

Once again, we urge you to comment on this attempt by the FCC to preempt your zoning authority.

10/28/97 11:00:36

Fax from Bill Bedell

301-495-4407

MM97-182

FCC Docket # 97-296

William Bedell  
18511 Meadowland Terrace  
Olney, MD 20832

FCC Dockets Branch  
Rm. 239  
1919 M St. NW  
Washington, D. C. 20037

**DOCKET FILE COPY ORIGINAL**

10/27/97

Do not allow control over tower construction to be [REDACTED] from FAA and given to the FCC. Even with FAA control, towers are constructed in dangerous locations such as the 1000 foot tower located under the 1500 foot floor of the Baltimore class B airspace on the approach to runway 33L. In order to meet legal separation requirements, this tower may not be overflown without an ATC clearance and therefore presents a mile wide road block in a corridor saturated with traffic that Baltimore ATC refuses to handle inside the class B airspace.

I had recent opportunity to scrutinize the airspace under the New York class B airspace south of Newark International. There is a 323 foot MSL tower co-located under the 1500 foot MSL Class B floor. The population density shown on the chart indicates that the tower should be overflown no lower than 1323 feet MSL leaving only a 177 foot sliver of airspace in which to navigate. Over both towers, ATC apparently allows arrivals to descend very close to the Class B floor, leaving me with great concern over TCAS resolutions, wake turbulence, or worse, midair collisions.

Not only shouldn't tower construction authority be taken from the FAA, the FAA needs MORE authority to relocate construction of towers like the two previously mentioned. Airspace capacity is already limited, any further reduction of VFR airspace will simply force more aircraft into the IFR system, taxing the system to its limits. The net effect will be a reduction in the total number of aircraft operations, all in a time when we are trying to maximize capacity.

Sincerely,



William Bedell

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NACO

National Association of Counties

MM97-182

Gmm

LEGISLATIVE ALERT

Staff Contact: Bob Fogel-(202)942-4217

October 9, 1997

DOCKET FILE COPY ORIGINAL

TO: Large Urban County Caucus  
State Association Executives  
Transportation and Telecommunications Steering Committee  
Washington County Representatives  
Telecommunications Group

FROM: Larry E. Naake  
Executive Director

RE: Federal Communications Commission (FCC) Preemption of Local Zoning

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County governments need to be concerned with this rule because it would severely preempt local zoning authority over the siting and construction of towers. The FCC proposes unrealistic time limits for local action on tower construction requests, preempts local concerns including aesthetics and environmental issues, and sets up the FCC, as opposed to the courts, as the authority for appeals.



rights of the rule making are as follows:

It requires local governments to act on all zoning and building permit requests for the fastest tower construction within 21 to 45 days, ignoring current local procedures for zoning requests. Failure to do so within these time limits would cause the request to be automatically granted.

Even acting within these time constraints, the proposed FCC rule would preempt all local zoning and building permit requirements unless a local government could demonstrate the requirement was reasonable in order to meet health or safety objectives. Other requirements such as aesthetics, property values, and environmental considerations would be preempted entirely.

- Any broadcaster unhappy with a local decision could appeal directly to the FCC, rather than going through the court system which is the current practice. County governments would be required to defend themselves at the FCC in Washington rather than in local State or Federal courts.

Once again, we urge you to comment on this attempt by the FCC to preempt your zoning authority.

Text Version | WordPerfect Version | Acrobat Version - 18 pages, 74 KB

FCC 97-296

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Preemption of State and Local Zoning and  
Land Use Restrictions on the Siting,  
Placement and Construction of Broadcast  
Station Transmission Facilities

MM Docket No. 97-182

## NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1997

Released: August 19, 1997

Comment Date: October 30, 1997

Reply Comment Date: December 1, 1997

By the Commission:

I. Introduction

1. The Commission is undertaking this proceeding to consider whether and in what circumstances to preempt certain state and local zoning and land use ordinances which present an obstacle to the rapid implementation of digital television ("DTV") service. Such ordinances may also serve to unduly inhibit the resiting of antennas made necessary by the implementation of DTV or stand as an obstacle to the institution and improvement of radio and television broadcast service generally. This issue has been brought before the Commission in a "Petition for Further Notice of Proposed Rule Making" filed jointly by the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("Petitioners").<sup>(1)</sup> While that Petition raises a number of issues crucial to the successful roll-out of digital television, it also raises a number of questions concerning the scope of any preemption of state and local laws and ordinances and the need to exercise that authority.

II. Background

2. In our Fifth Report and Order in the DTV proceeding, we adopted an accelerated schedule for construction of DTV transmission facilities to ensure the preservation of a universally available, free local broadcasting service and the swift recovery of broadcast spectrum. Under the construction schedule set forth in the Fifth Report and Order, affiliates of the top four networks in the top 10 markets are required to be on the air with digital signals by May 1, 1999. Affiliates of the top four networks in markets 11 - 30 must be on the air by November 1, 1999. Under this schedule, more than half of all television households will have access to multiple channels of digital broadcast television programming by November 1, 1999. All other commercial stations are required to construct their DTV facilities by May 1, 2002, and all noncommercial stations must construct their DTV facilities by May 1, 2003.<sup>(2)</sup> Subject to biennial review, and certain statutory exceptions, the current target date for all stations' return of their analog spectrum is 2006.<sup>(3)</sup>

the current target date for all stations' return of their analog spectrum is 2006.<sup>(3)</sup>

3. Petitioners state that this accelerated DTV transition schedule will require extensive and concentrated tower construction. They estimate that 66 percent of existing television broadcasters will require new or upgraded towers to support DTV service, involving an estimated 1000 television towers. Moreover, they state, as a result of the increased weight and windloading of DTV facilities and other tower constraints, a number of FM broadcast stations which have collocated their FM antennas on television towers will be forced to relocate to other existing towers or to construct new transmission facilities.

4. In addition to the logistical problems of modifying and constructing a significant number of towers (e.g., scarcity of construction crews, weather delays, supply shortages), Petitioners state that there "is an array of obstacles arising from state and local regulation of tower siting and construction" including environmental assessments, "fall radius," collocation and marking/lighting requirements, and concerns with interference to other electronic devices.<sup>(4)</sup> Petitioners are particularly concerned with the delays resulting from the administration of such restrictions, noting that multiple levels of review can last for several months, and that when appeals are involved, the process can take several years.<sup>(5)</sup>

5. In order to meet the Commission's DTV construction schedule, Petitioners ask the Commission to adopt a rule that would permit the Commission to preempt state and local zoning and other land use regulations to the extent they unreasonably prohibit or delay the DTV roll-out and other ongoing broadcast transmission facilities construction. They argue that the Commission has the legal authority to engage in such preemption where it is pursuing an objective within the scope of its Congressionally delegated authority and non-federal regulation stands as an obstacle to the accomplishment and execution of that objective. Both criteria, Petitioners assert, are present in the instant matter.

6. Petitioners propose a rule which provides specific time limits for state and local government action in response to requests for approval of the placement, construction or modification of broadcast transmission facilities. The rule proposed by the Petitioners, attached as Appendix B, would require action within 21 days with respect to requests to modify existing broadcast transmission facilities where no change in location or overall height is proposed or to strengthen or replace an existing broadcast transmission facility. Action would be required within 30 days with respect to requests to relocate existing broadcast transmission facilities from a currently approved location to another location within 300 feet, to consolidate two or more broadcast transmission facilities at a common tower or other structure or to increase the height of an existing tower. All other requests would have to be acted upon within 45 days.<sup>(6)</sup> Failure to act within these time limits would cause the request to be deemed granted.

7. Additionally, the requested rule would remove from local consideration certain types of restrictions on the siting and construction of transmission facilities. Petitioners would categorically preempt regulations based on the environmental or health effects of radio frequency ("RF") emissions to the extent a broadcast facility has been determined by the Commission to comply with its regulations and policies concerning emissions; interference with other telecommunications signals and consumer electronics devices as long as the broadcast antenna facility has been determined by the Commission to comply with its applicable regulations and/or policies concerning interference; and tower marking and lighting requirements provided that the facility has been determined by the Commission or the Federal Aviation Administration to comply with applicable tower lighting, painting and marking regulations or policies.

8. Further, the rule would preempt all state and local land use, building, and similar laws, rules or regulations that impair the ability of licensed broadcasters to place, construct or modify their transmission facilities unless the promulgating authority can demonstrate that the regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective other than the categorical preemptions described above.

9. To provide for expeditious review, the Petitioners' proposed rule requires that any state or local government decision denying a request be in writing, supported by substantial evidence, and delivered to all applicants within 5 days.<sup>(7)</sup> Any broadcaster adversely affected by any such action could, within 30 days of the decision, petition the Commission for a declaratory ruling on which the Commission, in turn, would have 30 days in which to act.<sup>(8)</sup> The rule would also authorize the Commission to administer dispute resolution.

### III. Discussion

10. In the Fifth Report and Order, we found that an accelerated roll-out of digital television was essential for four reasons. We found that absent a speedy roll-out, other digital television services might achieve levels of penetration that could preclude the success of over-the-air digital television, leaving viewers without a free, universally available digital programming service.<sup>(9)</sup> Second, we determined that a rapid construction period would promote DTV's competitive strength

internationally, spurring the American economy in terms of manufacturing, trade, technological development, international investment, and job growth.<sup>(10)</sup> Third, we stated that "an aggressive construction schedule helps to offset possible disincentives that any individual broadcaster may have to begin digital transmissions quickly."<sup>(11)</sup> Finally, we found that a rapid build-out would work to ensure that the recovery of broadcast spectrum occurs as quickly as possible.<sup>(12)</sup> This will enable the federal government to reallocate some of the recovered spectrum for public safety purposes, and to eventually auction the rest.<sup>(13)</sup>

11. To achieve these purposes, we instituted an "aggressive but reasonable" construction schedule, aimed at exposing as many homes to DTV as early as possible.<sup>(14)</sup> In the Fifth Report and Order, we noted that circumstances beyond a broadcaster's control, such as difficulties in obtaining zoning and other approvals, may interfere with its ability to meet construction schedule requirements.<sup>(15)</sup> We are, however, also sensitive to the important state and local roles in zoning and land use matters and their longstanding interest in the protection and welfare of their citizenry. Given the countervailing importance of accelerated construction of DTV transmission facilities, however, we seek to define those circumstances in which it may be necessary to preempt state and local regulations in order to achieve the benefits of a rapid roll-out of DTV.

12. As a preliminary matter, we note that it is well settled that the Communications Act of 1934, as amended ("Communications Act"), comprehensively provides for regulation of radio frequency interference and that the FCC has exclusive jurisdiction to resolve such questions.<sup>(16)</sup> With regard to interference affecting home consumer equipment in particular, Congress plainly stated in the 1982 amendments to the Communications Act that it intended federal regulation to completely occupy the field to the exclusion of local and state governments.<sup>(17)</sup> Thus, a rule preempting state and local zoning regulations based on electromagnetic interference would simply codify the existing state of the law. With respect to other aspects of the proposed rule --- preemption of state and local zoning restrictions based on environmental or health effects of RF emissions, tower lighting, painting and marking, and health, safety and traditional land use powers -- we have authority to preempt where state or local law, among other things, stands as an obstacle to the accomplishment and execution of the full objectives of Congress<sup>(18)</sup> or where we find preemption is "necessary to achieve [our] purposes" within the scope of our delegated authority.<sup>(19)</sup>

13. Congress explicitly indicated its objective of a speedy recovery of spectrum in Section 336(c) of the 1996 Telecommunications Act, "Recovery of License."<sup>(20)</sup> That section requires that the Commission establish as a condition of granting a DTV license the return of either that license or the original license held by the licensee "for reallocation or reassignment (or both) pursuant to Commission regulation." As indicated above, the Commission found that a speedy conversion would enhance the likelihood of success for the DTV roll-out and allow for the rapid recovery of spectrum. The Commission determined that a lethargic conversion would, to the contrary, undermine the potential for a successful conversion and thereby undermine the potential for such a recovery, as sought by Congress. The Commission also determined that the prompt, broad availability of DTV to the American public was an important public interest goal.<sup>(21)</sup>

14. Delays in local zoning and land use decisions would hold up the construction of an essential part of the DTV transmission system and make it impossible for a licensee to satisfy the construction requirement to transmit "a DTV signal strong enough to encompass the community of license," by the required deadline.<sup>(22)</sup> This could leave broadcasters unable to "give a great number of viewers access to a DTV signal in a very short period."<sup>(23)</sup> To the extent that state and local ordinances result in delays that make it impossible for broadcasters to meet our construction schedule and provide DTV service to the public, important Congressional and FCC objectives regarding prompt availability of this service to the public and prompt recovery of spectrum would be frustrated.

15. At the same time, we are sensitive to the rights of states and localities to protect the legitimate interests of their citizens and we do not seek to unnecessarily infringe these rights. The Commission recognizes its obligation to "reach a fair accommodation between federal and nonfederal interests."<sup>(24)</sup> Thus, it is incumbent upon the Commission not to "unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives."<sup>(25)</sup> These include not only certain health and safety regulations, which the Petitioners' proposed rule recognizes, but also the right of localities to maintain their aesthetic qualities.<sup>(26)</sup> Indeed, historically we have sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement. Nevertheless, we have adopted rules preempting local zoning ordinances where the record established that such ordinances were inhibiting the implementation of Congressional or FCC objectives, including with regard to locating satellite "dish" antennas and amateur radio towers.<sup>(27)</sup>

16. The Petitioners' proposed rule would cover siting of all broadcast transmission facilities construction. That is, petitioners have not limited their preemption rule to DTV-related construction, including the involuntary relocation of FM antennas now collocated on television towers. It is less clear that preemption will be needed where broadcasters do not face exigencies

such as DTV construction deadlines. There are now over 12,000 radio and 1,500 television station licenses outstanding, totals which suggest that generally compliance with state and federal laws relating to broadcast station construction and operation has been possible and that state regulation has not been an insuperable obstacle to the exercise of the Commission's "powers to promote and realize the vast potentialities of radio."<sup>(28)</sup> In these circumstances, we seek information on whether any preemption rule should be limited to DTV construction and to radio station transmission facility relocations resulting from such construction.<sup>(29)</sup> We also seek additional information on Petitioners' assertion that local zoning regulation "stands as an obstacle to the implementation of the DTV conversion and to the institution and improvement of broadcast service generally."<sup>(30)</sup>

#### IV. Request for Comments

17. In order to determine whether preemption is necessary and desirable and the scope of any preemption rule, we seek comment on a number of issues. This will enable the Commission to determine whether and how extensively it should exercise its authority to preempt state and local zoning and land use laws and ordinances.

18. As an initial matter, we generally invite comment on the Petitioners' proposals for the preemption of state and local laws, regulations and restrictions on the siting of broadcast transmission facilities. We seek comment on the Petitioners' proposed preemption rule. Alternatively, we request comment on whether any rule we adopt should focus on actions state and local governments would be preempted from taking or what state or local authority would be preempted by failure to act within a specified time period.<sup>(31)</sup>

19. We seek a detailed record of the nature and scope of broadcast tower siting issues, including delays and related matters encountered by broadcasters, tower owners and local government officials. Although Petitioners provide anecdotal evidence regarding difficulties encountered by several broadcasters in attempting to meet local ordinances in connection with tower siting and construction, we have no basis on which to determine the extent to which such difficulties are representative of radio and television broadcast industry tower siting experiences generally. So that we might have a factual basis upon which to determine the nature and extent of the problem, we ask commenters to provide us with information on their experiences, both positive and negative, with state and local zoning and land use approvals, and with the application of other laws and ordinances in connection with their efforts to site, construct and operate radio and television transmission towers. Particularly relevant would be comments on the duration of local permitting processes tied to such laws and ordinances. We are also particularly interested in receiving information about experiences related to obstacles and time constraints or delays encountered by broadcasters and tower owners in the top 30 markets.<sup>(32)</sup>

20. We are especially interested in the extent to which commenters believe any such difficulties are representative of difficulties that are now being faced or will be faced in the context of DTV build-out. Also, we request comments on whether existing laws, ordinances and procedures are likely to impede adherence to our accelerated DTV build-out schedule.

21. We seek comment on the scope of the preemption proposed by Petitioners, on the range of facilities to which the rule should apply and on the state and local laws, regulations, and other restrictions which federal law might preempt. Should we preempt local regulation for all broadcast facilities? Should the preemption be limited to construction of DTV transmission facilities and the relocation of those FM radio facilities displaced by DTV? Should the preemption be limited to the top markets in which the DTV roll-out schedule is more aggressive?

22. Should the Commission preempt state and local restrictions regarding exposure to RF emissions from broadcast transmission facilities? Are there other circumstances in which it is appropriate for the Commission to preempt state and local regulation of the siting or construction of transmission facilities? Should federal regulation preempt local regulation intended for aesthetic purposes?

23. We seek comment on the procedural framework proposed by Petitioners. Are the time frames proposed by Petitioners reasonable? Specifically, should we preempt state and local government authority where they fail to act within certain time periods? If so, what should be those time periods? Is 45 days appropriate, or would 90 days be more realistic for broadcast tower applications? Can the DTV construction schedule in the Fifth Report and Order be reconciled with the procedures of states and localities? In the event that we preempt as to procedural aspects of zoning and land use regulation, what constraints, if any, are there on the ability of state and local governments to meet the expedited procedures sought by Petitioners? We specifically ask states and localities to comment on their current procedures, their need to use these procedures, the possibility of using expedited procedures to assure our DTV construction schedule is met, and the nature of such expedited procedures. Is there an appropriate role for the Commission in resolving disputes between localities and licensees with respect to tower siting issues? What is the nature of that role -- arbitrator, mediator or simply the provider of a forum to which parties can turn for suggestions on resolving local disputes? Is outside arbitration, administered by the

Commission, an appropriate forum for alternative dispute resolution?

24. We note that we recently received an Advisory Recommendation on the Petitioner's proposal from the Commission's Local and State Government Advisory Committee.<sup>(33)</sup> This recommendation will be incorporated into the public record of this proceeding, and we will consider the issues raised by the Committee in this and any future filing.

#### V. Administrative Matters

25. Comments and Reply Comments. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before October 30, 1997, and reply comments on or before December 1, 1997. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

26. Initial Paperwork Reduction Act of 1995 Analysis. We have not proposed in this proceeding any proposed or modified information collection requirement.

27. Ex Parte Rules. This is a non-restricted notice and comment rule making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

28. Initial Regulatory Flexibility Analysis. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") is contained in Appendix A. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an IRFA of the expected impact on small entities of the proposals contained in this Notice. Written public comments are requested on the IRFA. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis, we ask a number of questions in our IRFA regarding the prevalence of small businesses in the industries covered by this Notice. Comments on the IRFA must be filed in accordance with the same filing deadlines as comments on the Notice, but they must have a distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981), as amended.

29. Authority. This Notice is issued pursuant to authority contained in Sections 4(i), 303, and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 307 and 336.

30. Additional Information. For additional information on this proceeding, please contact Keith Larson, Assistant Bureau Chief for Engineering or Susanna Zwerling, Policy and Rules Division, Mass Media Bureau (202) 418-2140.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

#### APPENDIX A

#### Initial Regulatory Flexibility Analysis

As required by Section 603 of the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 603, the Commission is incorporating an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and proposals in this Notice of Proposed Rule Making ("Notice"). Written public comments concerning the effect of the proposals in the Notice, including the IRFA, on small businesses are requested. Comments must be identified as responses to the IRFA and must be filed by the deadlines for the submission of comments in this proceeding. The Secretary shall send a copy of this Notice, including the IRA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.<sup>(34)</sup>

**Reasons Why Agency Action is Being Considered:** In its Fifth Report and Order in its digital television proceeding (MM Docket No. 87-268) the Commission adopted an accelerated roll-out schedule for digital television stations. That schedule requires the top four network affiliates in the top ten television markets to construct their digital television facility and begin emitting signals by May 1, 1999. Affiliates of these four networks in markets 11 - 30 must be on the air by November 1, 1999. All other commercial stations will have to construct their DTV facilities by May 1, 2002, and noncommercial stations by May 1, 2003. The Commission found this accelerated schedule necessary to promote the success of DTV and allow for spectrum recovery, a goal shared by Congress. In a rule making petition filed by the National Association of Broadcasters and the Association of Maximum Service Television the Petitioners claim that state and local zoning and land use laws, ordinances, and procedures may have a delaying effect on the siting, placement and construction of new television towers that will be needed for DTV. Additionally, they contend, the antennas of many FM radio stations will need to be displaced from existing towers to enable them to support new DTV antenna arrays and these FM stations will have to build new towers to enable them to continue to serve the public. Accordingly, they ask the Commission to adopt a rule preempting state and local laws, ordinances and procedures that could work to delay the inauguration of DTV service. The Commission believes the prompt deployment of DTV is essential to several goals, and that compliance with such local requirements may, at least in some cases, both make compliance with both these procedures and the roll-out schedule impossible. Additionally, it believes that some of these state and local regulations may stand as obstacles to the accomplishment of the rapid transition to DTV service and the spectrum recovery that it will permit. This recovery is also an important congressional purpose as evidenced by its 1996 adoption of 47 U.S.C. § 336.

**Need For and Objectives of the Proposed Rule Changes:** Petitioners have demonstrated that at least some state and local zoning and land use laws, ordinances and procedures may, unless preempted by the Commission, prevent television broadcasters from meeting the construction schedule for DTV stations established by the Commission, retarding the recovery of frequency spectrum by the government for reallocation and delaying digital service to the public. Additionally, in some cases they may result in discontinuation of FM radio service to the public should displaced FM antennas be unable to relocate to new antenna towers.

**Legal Basis:** Authority for the actions proposed in this Notice may be found in Sections 4(i), 303(r), and 336 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 336.

**Recording, Recordkeeping, and Other Compliance Requirements:** The Commission is not proposing any new or modified recordkeeping or information collection requirements in this proceeding.

**Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:** The initiatives and proposed rules raised in this proceeding do not overlap, duplicate or conflict with any other rules.

**Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:** Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."<sup>(35)</sup>

The proposed rules and policies will apply to television broadcasting licensees, radio broadcasting licensees and potential licensees of either service. The Small Business Administration defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.<sup>(36)</sup> Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.<sup>(37)</sup> Included in this industry are commercial, religious, educational, and other television stations.<sup>(38)</sup> Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.<sup>(39)</sup>

Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.<sup>(40)</sup> There were 1,509 television stations operating in the nation in 1992.<sup>(41)</sup> That number has remained fairly constant as indicated by the approximately 1,558 operating television broadcasting stations in the nation as of May 31, 1997.<sup>(42)</sup> For 1992<sup>(43)</sup> the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.<sup>(44)</sup>

Additionally, the Small Business Administration defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.<sup>(45)</sup> A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.<sup>(46)</sup> Included in this industry are commercial religious, educational, and other radio stations.<sup>(47)</sup> Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.<sup>(48)</sup> However, radio stations which are separate establishments and are primarily engaged in producing radio program material are classified under another SIC number.<sup>(49)</sup> The 1992 Census indicates that 96 percent (5,861 of 6,127) radio station establishments produced less than \$5 million in revenue in 1992.<sup>(50)</sup> Official Commission records indicate that 11,334 individual radio stations were operating in 1992.<sup>(51)</sup> As of May 31, 1997, official Commission records indicate that 12,156 radio stations were operating, of which 7,342 were FM stations.<sup>(52)</sup>

Thus, the proposed rules will affect many of the approximately 1,558 television stations; approximately 1,200 of those stations are considered small businesses.<sup>(53)</sup> Additionally, the proposed rules will affect some of the 12,156 radio stations, approximately 11,670 of which are small businesses.<sup>(54)</sup> These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television or non-radio affiliated companies.

In addition to owners of operating radio and television stations, any entity who seeks or desires to obtain a television or radio broadcast license may be affected by the proposals contained in this item. The number of entities that may seek to obtain a television or radio broadcast license is unknown. We invite comment as to such number.

**Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:** This Notice solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. The Commission believes that the proposed rules and policies may be necessary to promote the speedy deployment of digital television service and the prompt recovery of broadcast frequency spectrum for reallocation. We seek comment on this belief.

**Report to Small Business Administration:** The Commission shall send a copy of this Initial Regulatory Flexibility Analysis along with this Notice to the Small Business Administration pursuant to the RFA 5 U.S.C. § 603(a). A copy of this IRFA will also be published in the Federal Register.

## APPENDIX B

### Petitioners' Proposed Preemption Rule

In order to facilitate the rapid deployment of Digital Television ("DTV") services, as authorized by the Commission in MM Docket No. 87-268, and in recognition of the need to facilitate the siting and construction of broadcast transmission facilities generally, the following procedures and rules shall apply to the siting of new broadcast transmission facilities or the alteration or relocation of existing broadcast transmission facilities by television and radio stations whose operations have been authorized by the Commission.

(a) Siting Procedures. A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify broadcast transmission facilities within a reasonable period of time after a written request is filed with such government or instrumentality for any required permit or other authorization. For purposes of this subsection, a "reasonable period of time" shall mean:

- (1) within twenty-one (21) days, with respect to requests to (i) modify existing broadcast transmission facilities where no change in location or overall height is proposed, and (ii) strengthen or replace an existing broadcast transmission facility;
- (2) within thirty (30) days, with respect to requests to (i) relocate existing broadcast transmission facilities from a currently approved location to another location within 300 feet; (ii) consolidate two or more broadcast transmission facilities on a



common tower other structure, whether the tower or other structure is pre-existing or new; or (iii) increase the height of an existing tower;

(3) in all other cases, within forty-five (45) days.

The failure of a state or local government or instrumentality thereof to act on any request within a reasonable period of time will result in the request being deemed granted.

(b) Preemption.

(1) No state or local government or instrumentality thereof may deny a request to place, construct or modify a broadcast antenna facility on the basis of:

(i) the environmental or health effects of radio frequency emissions to the extent that such facility has been determined by the Commission to comply with the Commission's regulations and/or policies concerning such emissions;

(ii) interference effects on existing or potential telecommunications providers, end users, broadcasters or third parties, to the extent that the broadcast antenna facility has been determined by the Commission to comply with applicable Commission regulations and/or policies concerning interference;

(iii) lighting, painting, and marking requirements, to the extent that the facility has been determined by the Federal Aviation Administration ("FAA") or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting and marking;

(2) Any state or local land-use, building, or similar law, rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable in relation to:

(i) a clearly defined and expressly stated health or safety objective other

than one related to those set forth in Section (1)(i)-(iii) above; and

(ii) the federal interests in (i) allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public; and (ii) fair and effective competition among competing electronic media.

(c) Written decision. Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify a broadcast antenna facility shall be in writing and supported by substantial evidence contained in a written record. Such written decisions shall be delivered to all applicants within five (5) days.

(d) **Alternative Dispute Resolution.** In the event that an applicant is denied approval to place, construct, or modify a broadcast antenna facility, the applicant may elect to have its request submitted to an alternate dispute resolution process which shall be administered by the Commission. An Applicant whose request has been denied may elect arbitration by filing a written notice of election, including a copy of the written decision of the state or local government or instrumentality thereof, with the Commission within ten (10) days of receipt of the decision of the state or local government or instrumentality thereof. The Commission shall select an arbitrator to hear and resolve the dispute within five (5) days of receipt of the notice. The Commission shall conduct and complete the arbitration within fifteen (15) days of receipt of the applicants' written request for arbitration. If it is determined that the decision of the state or local government or instrumentality thereof is unsupported by the evidence in the record and would, if allowed to stand, frustrate the federal interests set forth above in paragraph (b)(2)(ii), the Commission shall issue an order vacating the decision of the state or local government or instrumentality thereof and granting the applicant's request to place, construct, or modify its broadcast antenna facility.

(e) **Declaratory Relief.** Any radio or television operator adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this rule may, within 30 days after such action or failure to act, petition the Commission for a declaratory ruling requesting relief. The Commission shall act on such petitions within thirty (30) days

(f) Definitions. For purpose of this section:

(i) "Broadcast transmission facilities" shall mean towers, broadcast antennas, associated buildings, and all equipment cables